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(7)

No. 05-1631

In the Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF, PETITIONER,

v.

VICTOR HARRIS, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, HAWAII, IDAHO, INDIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether it is "objectively reasonable" under the Fourth Amendment for a police officer to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk.

2. Whether, at the time of the incident, it was "clearly established" that an officer's terminating a dangerous high-speed chase by bumping the fleeing suspect's vehicle with his push bumper violated the suspect's Fourth Amendment rights.

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INTEREST OF THE *AMICI CURIAE*

This case presents two questions—whether petitioner seized respondent in violation of the Fourth Amendment and, if so, whether the Fourth Amendment right in question was "clearly established" at the time of petitioner's conduct. These questions reflect the two stages of the qualified immunity inquiry under *Saucier v. Katz*, 533 U.S. 194 (2001), which categorically requires federal courts first to resolve whether the plaintiff has alleged the violation of a cognizable constitutional right before determining whether that right was clearly established and, therefore, whether the defendant enjoys qualified immunity.

Amici States respectfully urge this Court to revisit and abandon *Saucier*'s rigid, two-step process for resolving qualified immunity claims. As shown below, and as petitioner ably demonstrates, petitioner is entitled to immunity under the second *Saucier* prong because, taking the facts in the light most favorable to respondent, petitioner's conduct did not violate any clearly established Fourth Amendment right. In cases like this one, where it is plain that the constitutional right in question was not clearly established at the time of the defendant's conduct, requiring courts to undertake the first *Saucier* inquiry and resolve the merits of the plaintiff's constitutional claim places needless burdens on courts and litigants, can require courts to make novel constitutional rulings without thorough briefing or a sufficient record, and often insulates such rulings from review.

Because state officers and employees regularly are defendants in actions brought under 42 U.S.C. § 1983, Amici States have a strong interest in how federal courts decide whether state defendants are protected by qualified immunity. The States also have a substantial interest in how federal courts define and develop the constitutional limits on official conduct.

In this regard, *Saucier*'s strict, two-step sequence not only makes litigation more burdensome, but also increases the likelihood of erroneous constitutional pronouncements that may be immune from appellate review.

Amici States also have a substantial interest in the merits of this case and a critical stake in the lower courts' correct implementation of qualified immunity doctrine. The doctrine, which requires plaintiffs to show that their asserted constitutional rights were "clearly established," not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (internal quotation marks omitted), was incorrectly applied by the Court of Appeals in this case.

STATEMENT

Because this case comes to the Court from the denial of petitioner's motion for summary judgment, all facts are taken in the light most favorable to respondent.

1. On March 29, 2001, a Coweta County deputy attempted to pull over respondent Victor Harris for speeding. Pet. App. 2a. Rather than stop his vehicle, Harris fled, driving between 70 and 90 miles per hour, through two red traffic lights, and crossing double yellow lines into the oncoming lane. *Ibid.* At one point, Harris collided with petitioner Timothy Scott's patrol car. *Id.* at 3a & n.1. Ultimately, after a chase lasting six minutes and covering nine miles, Scott used his car to bump Harris's vehicle. *Id.* at 2a, 4a. The contact caused Harris to lose control of his car and to crash, resulting in serious injuries. *Id.* at 4a.

2. On October 16, 2001, Harris filed suit under 42 U.S.C. § 1983 against Scott, other police officers, and Coweta County. Pet. App. 35a. Harris alleged, among other things, that Scott used excessive force when bumping Harris's vehicle, thereby

seizing him in violation of the Fourth Amendment. *Id.* at 6a, 35a. Defendants moved for summary judgment. *Id.* at 35a. In relevant part, the district court denied Scott qualified immunity from Harris's Fourth Amendment claim. *Id.* at 41a-42a.

3. The Court of Appeals affirmed. In accordance with *Saucier v. Katz*, *supra*, the court evaluated Scott's qualified immunity claim in two stages, first asking whether "the facts alleged show the officer's conduct violated a constitutional right," and then examining "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." Pet. App. 6a (internal quotation marks omitted).

The court answered both questions in the affirmative. *Id.* at 6a-22a. With respect to the second *Saucier* prong, the court concluded that Harris's Fourth Amendment theory was "clearly established" by the time of the high-speed chase, albeit only after conceding that it was relying on "a general constitutional rule" rather than more particularized authority. *Id.* at 20a. Specifically, the court found that Scott's conduct violated broad principles that seizures "of a fleeing suspect [must] be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force," and that "reasonableness" depends in part on "a 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.'" *Id.* at 16a-17a.

SUMMARY OF ARGUMENT

This case provides an opportunity to reconsider the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned * * * in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every

case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, Amici States respectfully urge the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

In addition, Amici States urge this Court to reverse the judgment below and, in so doing, to reinforce the principle—disregarded by the Court of Appeals—that government defendants lack qualified immunity only where the constitutional right at issue was "clearly established" in a sufficiently "particularized" way. *Brosseau*, 543 U.S. at 198-199.

ARGUMENT

The qualified immunity doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, *supra*, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the plaintiff has alleged the violation of a cognizable constitutional right; second, if the plaintiff has alleged such a right, the court must decide whether that right was "clearly established" at the time of defendant's alleged misconduct. 533 U.S. at 201.

Amici States argue two points here. First, *Saucier*'s rigid two-step framework causes a host of problems for courts and

litigants and threatens the integrity of constitutional decisionmaking. This case presents an opportunity to reconsider the requirement that courts deploy the two-step sequence in every case. Second, with respect to the instant case, the Court of Appeals erred in holding that Harris's alleged Fourth Amendment right was "clearly established" without requiring plaintiff to make the more particularized showing that this Court's precedents demand. Under the proper standard, Scott was entitled to qualified immunity.

I. Courts Should Not Be Required To Resolve The Underlying Constitutional Question Whenever A Government Official Raises A Qualified Immunity Defense.

In a series of decisions prior to *Saucier*, this Court articulated the aforementioned two-step procedure for resolving qualified immunity claims. See, *e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."). In *Saucier*, the Court expressly held that the two-step framework was not simply recommended, but mandated for use in all qualified immunity cases: "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." 533 U.S. at 200. At the "threshold," the court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next,

sequential step is to ask whether the right was clearly established." *Ibid.*[1]

For the following reasons, this Court should no longer mandate this two-step procedure, and instead should permit federal courts to grant qualified immunity without first deciding the merits of the plaintiff's constitutional claim.

A. The Mandatory, Two-Step Framework Has Drawn Criticism From Members Of This Court, And Lower Courts Have Sought To Limit Its Effect.

Both before and after *Saucier*, several Members of this Court have expressed strong opposition to imposing a mandatory, two-step "order of battle" whenever a government official seeks qualified immunity. See *Lewis*, 523 U.S. at 858-

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[1] In part to protect government officials who make reasonable, but mistaken, judgments, some courts of appeals characterize the inquiry as a three-step, rather than a two-step, process. The Second Circuit, for example, states that it has "further refined the second inquiry" into two subparts, granting qualified immunity whenever "the defendant's action did not violate clearly established law" *or* where "it was objectively reasonable for the defendant to believe that his action did not violate such law." *Poe v. Leonard*, 282 F.3d 123, 132-133 (2d Cir. 2002) (internal quotation marks omitted); see also, *e.g.*, *Swiecicki v. Delgado*, 463 F.3d 489, 497-498 (6th Cir. 2006) ("[T]his court occasionally performs a third step," which "requires inquiry into whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.") (internal quotation marks omitted); *Tremblay v. McClellan*, 350 F.3d 195, 199 (1st Cir. 2003) (third inquiry is "whether a reasonable officer could have concluded that his actions did not violate plaintiffs' constitutional rights").

859 (Breyer, J., concurring) (stating that *Siegert v. Gilley*, 500 U.S. 226 (1991), "should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented"); *id.* at 859 (Stevens, J., concurring) (two-step approach is appropriate "when the answer to the constitutional question is clear" but not when "the question is both difficult and unresolved"); *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg & Breyer, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.* at 1025 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review * * * or else drop any pretense at requiring the ordering in every case.") (emphasis in original); *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,'" which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); *id.* at 202 (Stevens, J., dissenting) ("When * * * the applicable constitutional rule is well settled, 'we should address the constitutional question at the outset.'"); see also *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.").

At the same time, lower courts have nibbled at the rule's edges in certain defined circumstances. For example, in a case involving an ambiguous state statute, the First Circuit granted qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the constitution; justifying its course, the court stated that "[a]lthough *Saucier* can be read as encouraging federal courts to decide unclear legal questions in order to clarify the law for the future, it surely did not mean to require federal courts to define and clarify unclear state statutes when this is wholly unnecessary to decide the case at hand." *Tremblay*, 350 F.3d at 200. Likewise, when presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier*'s first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks*, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005). And in an appeal where the district court granted judgment to the defendant under Fed. R. Civ. P. 50 on qualified immunity grounds while skipping the first prong, the Third Circuit elided the first prong as well, stating its belief "that the circumstances here * * * are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim." *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004), *cert. denied*, 126 S. Ct. 236 (2005).

Other lower courts have departed from the *Saucier* protocol on more general terms, without articulating a justification based upon the particular circumstances of the case. See, *e.g.*, *Cherrington v. Skeeter*, 344 F.3d 631, 640 (6th Cir. 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment command * * * because they are entitled to qualified immunity in any event."); *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir. 2002) ("[W]e retain the

discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all."); see also *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) ("[w]hether this rule is absolute may be doubted"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275, 1277 (2006) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that "involves so many and such serious problems that I am not sure where to begin").

The lower courts' noncompliance with *Saucier*'s mandatory framework has not escaped attention. Two years ago, Justice Scalia observed that the "understandable concern" with *Saucier* "has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory." *Bunting*, 541 U.S. at 1024 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) (citing cases). Shortly after that observation—and notwithstanding the caveat that the *Saucier* protocol was mandatory—the full Court in *Brosseau* unanimously resolved a § 1983 damages case under *Saucier*'s second prong, without resolving under the first prong whether the plaintiff had alleged a constitutional violation. 543 U.S. at 198. In so doing, the Court stated that it had "no occasion * * * to reconsider [its] instruction in *Saucier* * * * that lower courts decide the constitutional question prior to deciding the qualified immunity question," explaining that it had granted certiorari only "to correct a clear misapprehension of the qualified immunity standard." *Id.* at 198 n.3. Here, by contrast, the Court granted certiorari on both prongs of the *Saucier* analysis, which makes this case an appropriate one to reassess *Saucier*'s rule that courts must address the first prong before reaching the second.

B. *Saucier* Forces Courts To Make Unnecessary Constitutional Rulings, While Insulating Many Of These Decisions From Further Review.

Requiring courts to decide the merits of a § 1983 plaintiff's constitutional claim—even where the defendant obviously enjoys qualified immunity because the constitutional right in question indisputably was not "clearly established" at the time of the alleged misconduct[2]—departs from the fundamental principle that courts should render constitutional decisions only where doing so is essential to decide the case. See *Lewis*, 523 U.S. at 841 n.5 (acknowledging two-step protocol as an exception to "the generally sound rule of avoiding determination of constitutional issues"); see generally *Ashwander v. TVA*, 297 U.S. 288, 347 (1923) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Commencement Address of Chief Justice John G. Roberts, Jr., Georgetown Law School (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.") (webcast available at www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144).[3]

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[2] For example, if the defendant's conduct had been held unconstitutional by five circuits and constitutional by five others, then the defendant indisputably would be entitled to qualified immunity under *Saucier*'s second prong despite the difficulty of resolving under the first prong whether the conduct itself was unconstitutional.

[3] "Outside of the qualified-immunity context, [there is] just one setting in which federal courts must address constitutional questions before non-constitutional questions—when they adhere

On its own, this longstanding principle of judicial restraint counsels in favor of permitting courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. *Lewis*, 523 U.S. at 859 (Stevens, J., concurring) ("When * * * [the constitutional] question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."). The Second Circuit cited the virtue of judicial restraint to justify exercising its "discretion to refrain" from undertaking the first step of the *Saucier* test. *Koch*, 287 F.3d at 166 ("This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters."); see also *Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000) (criticizing mandatory two-step approach in part because it offends principle that "[f]ederal courts should not decide constitutional questions unless it is necessary to do so").

Saucier not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. See *Brosseau*, 543 U.S. at 202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. As the

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to the Article III requirement that they resolve jurisdictional issues before merits issues—and that issue plainly does not apply" in the qualified immunity context. *Lyons*, 417 F.3d at 581 (Sutton, J., concurring); see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). This exception for jurisdictional questions is necessary because, "unless Article III standing is satisfied, the court has no power to rule on the other issues in the case." Leval, *supra*, at 1277 n.83.

prevailing party, the defendant cannot appeal or seek certiorari review from the adverse constitutional ruling. See *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir.) ("The government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts."), *cert. denied*, 528 U.S. 1052 (1999); *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) ("[S]ome constitutional rulings effectively will be insulated from review by the *en banc* court of appeals or the Supreme Court where the appellate panel identifies a constitutional violation but grants qualified immunity under the second inquiry."); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2004) (Cardamone, J., concurring in part, dissenting in part) (observing that inability to appeal constitutional ruling when defendant prevails on qualified immunity "is, of course, an inescapable result of the sequential order of the *Saucier* inquiry").

The problem and its consequences are illustrated by *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004). Following the *Saucier* procedure, the Fourth Circuit first held that the Virginia Military Institute's use of the word "God" in a "Supper Roll Call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Id.* at 365-376. Although they had the judgment, the defendants sought certiorari review of the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." *Bunting*, 541 U.S. at 1022. The "tangle" arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.* at 1023; see also *Kalka*, 215 F.3d at 96 n.9 (noting that "[n]ormally, a party may not appeal

from a final judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court").

In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "comply[] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "defy[] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages." *Horne*, 191 F.3d at 247-248. This result is patently unfair to government officials and the governments they serve, for an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

C. *Saucier*'s Mandatory, Two-Step Rule Burdens Courts And Litigants, And Requires Constitutional Decisionmaking Without Sufficient Argument Or Record Evidence.

"[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense." *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring). The *Saucier* rule requires courts to delve into and decide constitutional disputes in every case, even those easily resolved under the second prong for lack of any "clearly established" right. See *Horne*, 191 F.3d at 249 ("For a judiciary that is already heavily burdened with cases it *must* decide, offering an unnecessary but simple solution to an easy problem is better justified than undertaking unnecessarily to untangle a difficult, complex issue.") (footnote omitted); *DiMeglio v. Haines*, 45 F.3d 790, 799 (4th Cir. 1995) ("courts should be free to decide the case on the most expedient ground").

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is confident of winning the case on the second prong. Adding to counsel's time, and defendant's expense, in this way undermines the very purpose behind the qualified immunity doctrine—to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; see also *DiMeglio*, 45 F.3d at 798 ("requiring that courts conduct a * * * would threaten to increase the burden of defending suits for public officials whose conduct was reasonable, by expanding the number of issues officials must prepare to address, brief, and argue").

Experience teaches that some parties will rationally choose to devote little time and effort to the constitutional issue presented in step one. *Motley*, 432 F.3d at 1077 ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated Motley's constitutional rights * * * and determine whether those rights were clearly established at the time of the search."); *Vives*, 405 F.3d at 118 n.7 ("We do not reach the constitutional question because we are reluctant to pass on the issue in dicta and because the parties did not genuinely dispute the constitutionality of [the challenged law] either in the District Court or on appeal."); *African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) (skipping to second step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed"); *Powers v. CSX Transp., Inc.*, 105 F. Supp. 2d 1295, 1308 (S.D. Ala. 2000) (citing, among reasons for skipping first step, fact that "the parties' briefing on the constitutional and statutory issues is not merely poor but essentially non-existent," which may be the product of the parties' "enlightened self-interest").

The reason for this is not difficult to ascertain. Individual defendants in § 1983 suits, particularly those employed by municipalities, are often represented by private counsel, who collectively have less interest in the long-term effects of an adverse constitutional ruling than in winning the case as efficiently and inexpensively as possible. See generally *Horne*, 191 F.3d at 247 ("[P]arties may do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case."). For the same reason, even if it were somehow possible for prevailing defendants to appeal from an adverse constitutional ruling on *Saucier*'s first prong, see *supra* pp. 11-13, such defendants often will have no incentive to do so, and the plaintiff (having lost on the "clearly established" prong) may have no incentive to defend the lower court's constitutional decision. See Leval, *supra*, at 1279 ("Even if the defendant officer could appeal from the dictum, in many cases he would not do so. He has won the case. * * * [E]ven if the defendant did care and did appeal, at this point the plaintiff would likely have no interest in the appeal.").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of its decisionmaking. See *Horne*, 191 F.3d at 247 ("Judges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

> [T]he fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price.

Leval, *supra*, at 1278-1279 (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis in original) (internal quotation marks omitted); see also *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where * * * discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case,

> Given the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack

> adequate information to do so. We think it clear that the third option is the preferable one.

Mollica v. Volker, 229 F.3d 366, 374 (2d Cir. 2000).

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. So, "[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, so there is a risk that constitutional questions may be prematurely and incorrectly decided where they are not well presented." *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) (citation omitted).

D. Requiring Courts To Decide Constitutional Claims In Every § 1983 Case Is Not Necessary To Develop The Law.

The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity * * *, standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841 n.5; see also *Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against *prohibiting* courts from doing so. See *Lyons*, 417 F.3d

at 581 (Sutton, J., concurring) ("All of this, however, just proves that the 'better approach' in this area is to resolve the first inquiry before the second one. It does not prove that the approach should be followed in all cases, and indeed a majority of the Justices have questioned the value of this strict requirement in recent years.") (citation omitted).

Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically *forbidding* courts from deciding whether § 1983 plaintiffs have alleged cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[a]dressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. See *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties."). There are a number of circumstances where such an approach would make sense:

> What of the district court that faces a complaint alleging dozens of constitutional violations? * * * What of the appellate panel facing a set of briefs in which the constitutional question is not only difficult but

> inadequately briefed? * * * And what of other settings: the appellate panel that cannot agree on the appropriate resolution of the constitutional question but can readily agree on the resolution of the clearly established question; the panel faced with a poorly presented constitutional question but an easily resolved clearly established question; the panel faced with a constitutional question that is not only difficult but highly fact specific and therefore unlikely to provide meaningful guidance in future cases; or the panel faced with a constitutional question that is essentially irrelevant to the case at hand because of significant intervening developments in the law?

Lyons, 417 F.3d at 582 (Sutton, J., concurring) (internal citation omitted).

Moreover, constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S. at 841 n.5 (noting that qualified immunity is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion"); *Virgili v. Gilbert*, 272 F.3d 391, 394 (6th Cir. 2001) (relying solely on "clearly established" prong to decide in defendants' favor, "not[ing] that ample opportunities exist to establish [the constitutional] standard via other means, for example through actions for declaratory or injunctive relief"); *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir. 2000) ("[T]he Court should not determine the existence of the constitutional right alleged if the question could be decided in proceedings in which qualified immunity is not a defense."); *Santamorena v.*

Georgia Military College, 147 F.3d 1337, 1344 n.16 (11th Cir. 1998) ("Refraining (until truly necessary) from deciding—in qualified immunity cases—the more perplexing federal law issues will not inevitably preclude the law in due course from becoming clearly established. Suits seeking injunctions, suits against local governments, and certain criminal proceedings can settle the law."); Leval, *supra*, at 1280-1281 (even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, * * * where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

In sum, there is no reason to presume that constitutional law would stand still if courts enjoyed the discretion to deviate from the *Saucier* rule in certain cases. As Judge Sutton explained,

> The same risk exists in other areas of law * * * . And yet the ability of courts to skip to the second inquiry (*e.g.*, to go straight to the harmlessness of the error or *Teague's* new-rule inquiry * * *) does not seem materially to have inhibited the development of constitutional law.

Id. at 583. The same could be said of how federal courts resolve habeas cases under 28 U.S.C. § 2254(d)(1), which asks not whether the state criminal court's constitutional ruling was correct on the merits, but whether it was contrary to or an objectively unreasonable application of clearly established law established by this Court's precedents. See *Carey v. Musladin*, 549 U.S. ___, slip op. at 4, 6-7 (2006). The same also could be said of how courts resolve ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), which expressly allows such claims to be rejected solely under the prejudice prong without consideration of whether the

attorney's performance was constitutionally inadequate. *Id.* at 697. Constitutional criminal law has continued to develop after Congress enacted § 2254(d)(1), see *Musladin*, slip op. at 2-3 (Kennedy, J., concurring) (agreeing that relief unavailable under § 2254(d)(1) because the constitutional rule invoked by habeas petitioner "has not been clearly established by our cases to date," but urging that the rule "be explored in the court system, and then established in this Court"), as have the standards governing the performance of defense counsel after *Strickland*, and constitutional law governing the conduct of government officials will develop as well even absent *Saucier*.

E. Abandoning the *Saucier* Rule Would Not Offend Principles of *Stare Decisis*.

Although the Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution," "[*s*]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court, unevenly applied by the Court, and narrowed and even disregarded by the courts of appeals.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases * * * involving procedural and evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Like procedural and evidentiary rules, *Saucier*'s two-step protocol does not affect the way that parties order their affairs. Abandoning *Saucier*'s categorical rule would not upset settled expectations on

anyone's part. See *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan*, 522 U.S. at 20. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Not so here. Because the *Saucier* rule is judge-made, only this Court can change it.

Moreover, the "Court has never felt constrained to follow precedent" "when governing decisions are unworkable or badly reasoned." *Payne*, 501 U.S. at 827 (internal quotation marks omitted). For the reasons set out above (*supra* pages 9-20), a mandatory, two-step rule for resolving all qualified immunity claims has had unforeseen, adverse collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent.

Finally, several Members of this Court have criticized the *Saucier* rule, the full Court recently declined to follow it in *Brosseau*, and courts of appeals have sought to narrow the rule or disavow it altogether. See *supra* pp. 6-9. These factors, too, make reconsideration appropriate. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("Members of this Court * * * have suggested that we revise our doctrine * * * ."); *Hohn v. United States*, 524 U.S. 236, 252 (1998) (overturning precedent that "has often been disregarded in our own practice"); *Payne*, 501 U.S. at 829-830 (overturning past decisions of the Court that had "been questioned by Members of the Court in later decisions, and [had] defied consistent application by the lower courts").

* * *

Saucier's rigid, two-step formula imposes burdens on courts and litigants, threatens to detract from the quality and coherence of constitutional decisionmaking, and is wholly unnecessary to achieve its stated purpose. Accordingly, Amici States respectfully urge the Court to abandon the rule as a requirement for use in every qualified immunity case.

II. The Court of Appeals' Judgment Should Be Reversed On Qualified Immunity Grounds.

As petitioner's brief demonstrates, the Court of Appeals erred in holding that Harris's alleged constitutional right was "clearly established" and that Scott's qualified immunity defense therefore failed. General constitutional standards are rarely sufficient to show that a right is "clearly established"; the right must be established "in a more particularized, and hence more relevant, sense." *Brosseau*, 543 U.S. at 198-199 (2004) (internal quotation marks omitted). The Court of Appeals denied qualified immunity to Scott only by relying on inadequate, general standards.

The court cited *Tennessee v. Garner*, 471 U.S. 1 (1985), for the proposition that "the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force," and quoted *Graham v. Connor*, 490 U.S. 386, 396 (1989), for the principle that "reasonableness" in this context depends in part on "a 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue.'" Pet. App. 16a-17a. The court conceded that it was relying on "a general constitutional rule" rather than more specific, factually related authority. *Id.* at 20a. But this Court's broad statements in *Graham* and *Garner* are insufficient in themselves to "clearly establish" Fourth Amendment rights, except in cases so obvious that factually

analogous authority is unnecessary—an exception that the Court of Appeals properly declined to invoke. *Id.* at 28a n.15.

In fact, the Court of Appeals made precisely the mistake that the Ninth Circuit made in *Brosseau* when it "proceeded to find fair warning in the general tests set out in *Graham* and *Garner*," tests that "are cast at a high level of generality." *Brosseau*, 543 U.S. at 199; see also *Wilson*, 526 U.S. at 615 ("It could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police," but "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). In reversing the Ninth Circuit's judgment denying qualified immunity to a police officer who used deadly force to stop a fleeing suspect, this Court reaffirmed the need for more specific notice:

> [T]here is no doubt that *Graham* * * * clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)], that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Brosseau, 543 U.S. at 198-199 (internal quotation marks omitted). Indeed, general standards are particularly deficient where, as here, the constitutional "area is one in which the result depends very much on the facts of each case." *Id.* at 201.

Had the Court of Appeals adhered to settled qualified immunity standards, it would have granted qualified immunity

to Scott on the ground that Harris's alleged constitutional right was not "clearly established." Its contrary judgment should be reversed.

CONCLUSION

The Court should abandon the strict "order of battle" imposed by *Saucier*, and judgment of the court of appeals should be reversed.

Respectfully submitted.

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